Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ABBAS ASSAR, M.D.,
Petitioner,

v.

CRESCENT COUNTIES FOUNDATION FOR MEDICAL CARE

and

CENTRAL ILLINOIS MEDICAL REVIEW ORGANIZATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a *Bivens* claim.

A *Bivens* remedy allows individuals whose constitutional rights have been violated by federal officers to sue for money damages in federal court. The question presented is:

Is a *Bivens* remedy available to an individual whose constitutional rights are violated when a federal agency obstructs the administrative review process and fails to comply with statutory agency requirements, thus preventing that individual from having administrative and judicial review?

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Petitioner, Abbas Assar, M.D., prays that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the District Court's dismissal of Petitioner's suit based on lack of subject matter jurisdiction.

OPINIONS BELOW

U.S. Court of Appeals for the Seventh Circuit Opinion, Appendix A (1a). U.S. District Court, Central District of Illinois, Appendix B (12a). Denial of Petition for Rehearing, Appendix C (22a).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on December 29, 1993 (Appendix 1a). The Court of Appeals denied a timely petition for rehearing on March 9, 1994 (Appendix 22a).

The case arose under the Fifth Amendment of the United States Constitution and the District Court had jurisdiction under 28 U.S.C. § 1331. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES

42 U.S.C. § 1320c-5b(1):

> If, after reasonable notice and opportunity for discussion with the practitioner or person concerned, any organization having a contract with the Secretary under this part determines that such practitioner or person has—
>
> > (A) failed in a substantial number of cases substantially to comply with any obligation imposed on him under subsection (a) of this section, or
> >
> > (B) grossly and flagrantly violated any such obligation in one or more instances, such organization shall submit a report and recommendations to the Secretary. If . . .

28 U.S.C. § 1361:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff.

42 C.F.R. § 1004.50-1004.90:

> See Appendix D, pg. 23a.

STATEMENT OF THE CASE

Petitioner, Abbas Assar, M.D., is a physician. Respondent, Crescent Counties Foundation for Medical Care, and Respondent, Central Illinois Medical Review Organization, are peer review organizations (PRO's). Respondents are under contract with the Health Care Financing Administration ("HCFA") to review the medical care provided by physicians and hospitals participating in the Medicare program. PRO's review the medical services provided to Medicare patients by physicians to assure that the services will be of a quality which meets professionally recognized standards of health care.

Respondents reviewed the medical care which Petitioner provided to a Medicare patient and alleged his care of the patient was of poor quality and the treatment constituted a "gross and flagrant violation" of his duties under the Medicare program. Thereafter, Respondents limited and restricted Petitioner's ability to care for Medicare patients. The statutes and regulations set out by Congress which govern PRO's have an elaborate step-by-step procedure mandating how the PRO is to proceed when an alleged gross and flagrant violation is identified. The PRO's refused to follow the statutes and regulations. See 42 U.S.C. § 1320c-5(b) (see Statutes pg. 2); 42 C.F.R. §§ 1004.50-1004.90 (Appendix pg. 23a). These regulations include an extensive appeal process available to an involved physician including a hearing before an administrative law judge and judicial review.

The PRO refused to follow the regulations set forth by Congress and instead embarked on its own pathway. This pathway prevented the Petitioner from gaining access to Congress' appeals scheme. Among other things, they did not provide Assar with written notice as required by 42 C.F.R. § 1004.50 (Appendix pg. 23a) and did not submit a report to the Office of the Inspector General (OIG) as required by 42 C.F.R. § 1004.70 (Appendix pg. 24a). The refusal to submit the report to the OIG and the failure

to provide written notice deprived Petitioner of his due process rights under the administrative scheme. The failure to submit the report to the OIG prevented the OIG from determining if the PRO had followed its procedures and from determining if a violation had actually occurred. 42 C.F.R. § 1004.90(b) (Appendix pg. 25a). Petitioner was never informed of any appeal rights and since the OIG had never made a determination he did not gain his right to administrative review. This prevented the administrative review process from going forward and prevented Dr. Assar from appealing the PRO allegations and penalties.

Petitioner filed suit in District Court asserting, among other things, a Fifth Amendment due process claim and attempted to recover under a *Bivens* claim. The District Court dismissed the case finding that the "Social Security Act" includes detailed statutory mandates providing for several levels of administrative review of the actions of the PRO's and the sanctioning of a Medicare provider (Appendix B pg. 12a). The Court suggested that Petitioner file a federal mandamus action under 28 U.S.C. § 1361 to compel the PRO's to comply with the statutes and regulations which Congress set up.

The U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal finding that since Congress had "created a comprehensive scheme by which physicians can obtain review of PRO decisions," a *Bivens* remedy was unavailable (Appendix A pg. 1a). The Court suggested that Petitioner could have sought relief under 28 U.S.C. § 1361 to force the PRO to follow Congress' regulations and allow him his administrative appeal rights.

REASONS FOR GRANTING WRIT

This case involves a *Bivens* claim which is based on the premise that individuals whose constitutional rights have been violated by federal officers can sue for money damages. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Petitioner did not want to file a *Bivens* claim against Respondents. The only thing that Petitioner wanted was to appeal Respondents' decision to restrict his ability to care for Medicare patients. Petitioner, from the outset, merely wanted to follow the procedures that Congress set up which allow a physician to appeal an adverse PRO decision. Respondents refused to allow him to do so. Forcing Respondents to follow Congress' theme at this point is moot. Respondents have already notified hospitals and individuals that Petitioner is a "bad doctor." Respondents have restricted his ability to care for Medicare patients. Dr. Assar's medical practice is all but ruined. This was all done in direct violation of the rules and regulations that Congress set up.

The issue involved in this case has divided the U.S. Court of Appeals for the Seventh Circuit, the Eighth Circuit in *Glasgow v. United States Drug Enforcement Administration*, 12 F.3d 795 (1993), and the U.S. Court of Appeals for the Federal Circuit in *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir., 1988). The outcome of this case has the potential to affect every person in the United States. Anyone who deals with the government or any federal agency can be adversely affected if the Seventh Circuit's decision is allowed to stand.

Congress has set up hundreds of federally authorized agencies to help administer all of the social programs that society makes available to its citizens. Most of the programs, if not all of them, include an extensive framework of appeals that allow a citizen dealing with that agency the opportunity to appeal a decision that he or she feels is unjust or adversely affects him or her. Congress is

generally very careful to afford each citizen multiple chances to appeal an adverse agency decision. The problem in our case involves an agency which chose to ignore the rules, regulations, and statutes that Congress has enacted. *Ysasi v. Rivkind,* 856 F.2d 1520 (Fed. Cir. 1988) dealt with issues very similar to ours. The *Ysasi* decision is in direct conflict with the decision of Petitioner's case.

In *Ysasi,* a migrant farm worker, Ysasi, had his truck confiscated by Border Patrol agents. He attempted to recover his truck by filing an administrative appeals claim with the Immigration and Naturalization Service (INS). Although Congress had set forth a comprehensive statutory and regulatory scheme to allow individuals like Ysasi to challenge the validity of an improper seizure, the INS ignored that scheme and improperly sold his truck. *Id.* at 1528. The INS prevented Ysasi from utilizing the available procedures which Congress had set forth to obtain the return of his truck. The Court allowed a *Bivens* claim since the INS had failed to follow Congress' comprehensive statutory and regulatory scheme.

Our circumstance is very similar to the *Ysasi* case. As in that case, Petitioner was adversely affected by an agency that chose to ignore Congress' regulations. A federally authorized agency chose to ignore the comprehensive statutory and regulatory scheme that Congress had developed to allow physicians to challenge an adverse PRO decision. The Seventh Circuit Court of Appeals held that since Congress had created a comprehensive scheme by which physicians could obtain review of PRO decisions, then a *Bivens* claim was unavailable. The Court ignored the fact that Petitioner was never allowed to access the comprehensive scheme.

In *Glasgow v. United States Drug Enforcement Administration,* 12 F.3d 795 (1993), the Eighth Circuit also addressed a similar issue. A claimant whose money was forfeited brought a *Bivens* action against the Drug Enforcement Administration (DEA), and others, claiming

violation of his constitutional rights. Among other things, claimant alleged that the DEA did not comply with Congress' statutory and constitutional notice requirements. The Eighth Circuit refused to uphold the dismissal of a *Bivens* claim. They noted that the DEA's compliance with the statutory notice requirements were essential components of Congress' statutory regime. *Id.* at 797. The Agency's actions reflected an attitude of concealment rather than enlightenment, and did not meet the basic demands of due process. *Id.* at 798.

The crux of Petitioner's case is that a federal agency cannot completely ignore Congress' comprehensive scheme which mandates how that agency functions and then escape a *Bivens* claim. The U.S. Court of Appeals for the Federal Circuit and the Eighth Circuit allow a *Bivens* claim in such circumstances. The Seventh Circuit's opinion does not allow a *Bivens* claim under the same circumstances.

Congress is authorized with the power to set up federal agencies. They usually enact a detailed step-by-step remedial system to provide individuals with a mechanism to appeal constitutional violations that may occur in the course of agency administration. Millions of private individuals are affected by hundreds of federal agencies. A series of Post-*Bivens* cases that are distinguishable from Petitioner's case have addressed *Bivens* claims.

Schweiker v. Chilicky, 487 U.S. 412 (1988), dealt with a plaintiff who had been denied social security benefits and was attempting to recover damages for alleged due process violations. The Plaintiff chose not to utilize the appeals process which Congress had set up for individuals who had been denied benefits. The Court noted that the Social Security Act provided a multi-step framework of appeals available to individuals who had suffered alleged constitutional violations and thus refused to create a *Bivens* remedy. The Court reasoned that the Plaintiff could utilize the Congressional framework of appeals since it was available.

Hilst v. Brown, 874 F.2d 725 (10th Cir., 1989) (per curiam), involved a physician seeking damages for due process violations that had occurred when he was suspended from the Medicare program. A *Bivens* claim was not allowed because a comprehensive remedy was available to the suspended physician including an administrative and judicial review of his suspension.

The Plaintiffs in both *Chilicky* and *Hilst* could utilize an extensive appeals process which Congress had set up. Our Petitioner could not.

The importance of our case hinges on the fact that federal agencies must be required to follow the statutes and regulations that Congress enacts. We cannot have agencies arbitrarily disregarding Congress' rules and procedures. *Chilicky* pointed out it is appropriate for a federal agency to be shielded from a *Bivens* claim if the agency follows the regulatory framework Congress has outlined. Petitioner argues it is *not* appropriate to give the same agency immunity from a *Bivens* claim if they choose to arbitrarily ignore that regulatory framework. Federal agencies should not be able to deliberately abuse their governmental power, ignore federal statutes and regulations, violate the constitutional rights of citizens, and then escape *Bivens* liability.

As an example, hundreds of thousands of welfare recipients deal with federal agencies every day. Many of these recipients are indigent, uneducated, or disabled. Congress constructs federal agencies in a manner, at least in part, to protect citizen's rights. We cannot tolerate a system that allows an agency to arbitrarily disregard the rules and regulations that Congress enacts governing that agency, and then leave those welfare recipients with no recourse against the agency. If a federal agency violates the constitutional rights of a welfare recipient and ignores the framework that Congress enacts to protect those welfare recipients, then a *Bivens* claim should be available to

them. It is unrealistic to presume that these welfare recipients might bring a federal mandamus action under 28 U.S.C. § 1361 to compel an agency to follow their own rules, as the Appellate Court suggested in Petitioner's case. It is unrealistic to assume that these indigent, uneducated, or disabled individuals would be able to seek out an attorney, finance and orchestrate a federal mandamus action against a federal agency to compel the agency to do what it is already obligated to do . . . provide them with due process rights.

The Seventh Circuit, in giving its opinion, did not address the main issue in this case. That is, Petitioner was never allowed to access the comprehensive statutory and regulatory scheme which Congress had enacted. Respondents disregarded the procedures and regulations governing the PRO system and thereby denied Petitioner his due process right to administrative hearings as well as administrative and judicial review. Although an elaborate procedural framework existed, Petitioner could not access that framework due to Respondent's illegal actions. Both the District Court and the Appellate Court suggest that Petitioner could have sought relief under 28 U.S.C. § 1361, the federal mandamus action, to compel the agencies to follow the regulations. An individual should not be required to bring a federal mandamus action to protect his due process rights to an administrative review. They have ignored the fact that Petitioner's harm and damages had already occurrred. Compelling the agency to follow the rules at this point would be moot.

Hilst, 874 F.2d at 727-28, acknowledged that an elaborate administrative and judicial review was available to the Plaintiff and reasoned that "so long as the remedy, although incomplete, is adequate and the safeguards meaningful" then a *Bivens* action is unavailable. Petitioner argues that 28 U.S.C. § 1361 is not a "remedy" as referred to in *Bush v. Lucas,* 462 U.S. 367, 380 (1983), *Chilicky,* 487 U.S. at 425, or *Hilst,* 874 F.2d at 727-28.

The "remedy" is the elaborate administrative hearing, and administrative and judicial review which the Respondents prevented Petitioner from utilizing. Petitioner suggests that he had no meaningful safeguards available to protect his due process right to access Congress' comprehensive statutory and regulatory scheme.

Both the District Court and the Appellate Court relied heavily on *Chilicky*, 487 U.S. 412, determining that Congress has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were." *Id.* at 425. The problem with this reasoning, as pertains to our case, seems simple. Congress did construct a system which would normally protect individuals like Petitioner with meaningful safeguards and remedies. Respondent did not follow that system. Since Respondents arbitrarily ignored Congress' rules and regulations, Petitioner had no meaningful safeguards or remedies and Petitioner was never a participant in the comprehensive statutory scheme.

Similarly, *Hilst*, 874 F.2d 725 (10th Cir., 1989) (per curiam) was cited by the Appellate Court in support of its decision but in that case the Plainitff had the availability of administrative review. The Plaintiff had been suspended from the Medicare program and he utilized the extensive appeals process which Congress had constructed. Plaintiff was able to utilize Congress' appeals framework. Petitioner in our case was never able to do so. Even the Court in *Hilst* at 727 mentioned *Ysasi*, 856 F.2d 1520, acknowledging that a *Bivens* remedy was available despite *Chilicky* when utilization of statutory relief was "frustrated" by the Defendant.

CONCLUSION

This case involves important issues which can affect millions of individuals who deal with federal agencies. The threat of a *Bivens* claim may be the only realistic mechanism to encourage federal agencies to follow the

rules which Congress enacts. Without that threat, agencies will have no incentive to do so. The U.S. Court of Appeals are now in conflict on this issue. The United States Supreme Court should decide this important matter.

Respectfully submitted,

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